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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/991,127	11/14/2001	Ethan George Russell	55994.0120	5209
57600 7590 11/10/2008 HOLLAND & HART LLP 60 E. South Temple, Suite 2000 P.O. Box 11583 Salt Lake City, UT 84110			EXAMINER STRANGE, AARON N	
			ART UNIT 2453	PAPER NUMBER
			MAIL DATE 11/10/2008	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

09/991,127

Applicant(s)

RUSSELL ET AL.

Examiner

AARON STRANGE

Art Unit

2453

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 August 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8, 10, 12, 21-29, 31-38, 40-50, 52-56 and 62-68 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

- 5) ☐ Claim(s) _____ is/are allowed.

- 6) ☒ Claim(s) 1-8, 10, 12, 21-29, 31-38, 40-50, 52-56 and 62-68 is/are rejected.

- 7) ☐ Claim(s) _____ is/are objected to.

- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Response to Arguments

1. Applicant's arguments, see pp. 26-27, filed 8/29/08, with respect to claims 32, 41 and 53 have been fully considered and are persuasive. The rejection of those claims has been withdrawn.
2. Applicant's remaining arguments filed 8/29/08 have been fully considered but they are not persuasive.
3. Applicant's primary argument asserts that "[t]he 'client software' described in Bryant is not the same as the 'client-side Javascript' that is 'submitted to the client as part of the page'", but is instead some sort of software "installed on the client machine to 'instrument' the browser" (Remarks, 21). The Examiner respectfully disagrees with this assertion, since Bryant discloses that the browsers used by the disclosed system are "off-the-shelf" browsers, including the well known Netscape Navigator and Microsoft Internet Explorer (col. 3, l. 64 to col. 4, l. 3).

While Bryant does state that "browsers that support the RSP cookie protocol are called instrumented browsers" and that the method assumes that requests "originate[] from an instrumented browser" (col. 6, ll. 5-8), at no point does Bryant state that a browser requires separate software to be installed by the client to make them compatible with the RSP cookie protocol, while Bryant's disclosure that the client uses

an "off-the-shelf" browser directly conflicts with an interpretation that requires the installation of special software by the user.

4. With regard to Applicant's assertion that Bryant fails to disclose "including machine instructions with the distributed application data that define, perform, or cause to perform, independent of any other instructions, a performance monitoring function" (Remarks, 22), the Examiner respectfully disagrees. While the specification of the present application fails to describe providing machine instruction that define a performance function independent of *any* other instructions (discussed below), Bryant's performance monitoring function is independent of other instructions to the same degree as the instructions described in the specification of the present application.

As discussed above, Bryant's performance monitoring function is not dependent on the installation of special "instrumentation" software. Bryant's performance monitoring function (col. 9, ll. 1-14) does depend on a previous page having instructions that record an initial timestamp (col. 8, ll. 22-29). However, this same dependency is required by the claimed invention (see t7 of Table 2)(Spec., 20-21).

5. With regard to claim 8, and Applicant's assertion that none of the cited references teach "determining whether to collect a performance metric from the second site as a function of a specific performance metric that was determined at the second site" (Remarks, 24-25), the Examiner respectfully disagrees. Bland discloses that clients only collect data that is pertinent to a server in response to a request from that server

(col. 4, l. 64 to col. 5, l. 16). Since the servers request specific types of information, and some information requires client permission to obtain, the requests are filled "as a function of" the specific metric determined at the second site (servers receive only the specific metrics that they request, and only those metrics that the client gives permission to collect) (col. 5, ll. 11-14).

6. With regard to claims 5, 25 and 46, and Applicant's assertion that none of the cited references teach "wherein the probabilistic sampling parameter is applied on a per-site basis" or a "per-user basis" (Remarks, 25), the Examiner respectfully disagrees. Bryant teaches applying a probabilistic sampling parameter to determine whether to collect performance metrics (col. 6, ll. 41-46). Bland teaches collecting data about client sessions wherein data about request delays is collected for an entire session prior to sending it to the server (col. 3, ll. 19-23). When considered in combination, Bryant and Bland teach applying the probabilistic sampling parameter on a per-session basis to collect information about the client's entire experience based on how the delays changed throughout a session.

Claim Rejections - 35 USC § 112

7. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

8. Claims 1-8, 10, 12, 21-29, 31-38, 40-50, 52-56 and 62-68 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement.

The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

9. With regard to claim 1, the limitation "including machine instructions ... that define, independent of any other instructions, a performance monitoring function" is not described in the specification. Table 2 discloses that the browser monitor is loaded as a component of a page received at the client (time t3). The browser monitor is subsequently loaded by the browser (time t6) and used to record a time "end of fetch/start of render" (time t7). This value is then used to compute FetchLatency (time t7). However, FetchLatency *depends* on the value of FetchStart, which is recorded by the browser prior to the browser monitor even being received at the client (FetchStart is recorded at time t0, while the browser monitor is not received until time t3). Therefore, the machine instructions that define the performance monitoring function are not described as being "independent of any other instructions", as claimed.

10. Independent claims 21, 35, 42 and 62 contain a substantially identical limitation, and are rejected under the same rationale.

11. All claims not individually rejected are rejected by virtue of their dependency from the above claims.

Claim Rejections - 35 USC § 103

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. Claims 1-8, 11, 12, 21-29, 31, 33-38, 40, 42-50, 52, 54-56 and 62-68 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bryant et al. (US 6,078,956) in view of Bland et al. (US 5,732,218).

14. With regard to claim 1, Bryant discloses a method for determining one or more performance metrics for a distributed application in which distributed application data are transferred from a first site (server) to a second site (client) over a network, comprising the steps of:

(a) enabling a user to transmit a request for the distributed application data desired by the user, said request being transmitted from the second site to the first site over the network (user clicks link to submit request)(at least Col 7, Line 61 to Col 8, Line 13);

(b) transmitting, in response to the request, the distributed application data from the first site to the second site over the network (link is followed) (at least Col 8, Lines 16-17);

(c) including machine instructions with the distributed application data that define, independent of any other instructions, a performance monitoring function, the machine instructions and the distributed application data being a single data file (code is submitted as part of the page)(at least Col 8, Line 66 to Col 9, Line 15); and

(d) executing the machine instructions at the second site (received script is run), to implement the performance monitoring function used to determine the one or more performance metrics (time required to service request) (at least Col 9, Lines 5-18) for the distributed application without using the performance monitoring function to request any distributed application data from any site (no requests are made in code), at least one of the one or more performance metrics being determined in connection with timing of events occurring during the transmission of the distributed application data to the second site (the time to download the page containing the distributed application data) (at least Col 9, Lines 5-18).

Bryant further discloses how correlated performance metrics may be determined by combining the one or more performance metrics determined at the second site with a performance metric determined at the first site (col. 5, ll. 7-26), but fails to specifically disclose doing so.

Bland discloses a similar system for monitoring interactions between a first site and a second site (col. 2, ll. 1-16). Bland teaches determining a first performance metric

at a first site (server collects performance metrics such as server processing time)(col. 3, ll. 17-22 & 48-52), determining a second performance metric at a second site (client collects metrics such as delays between requests and responses)(col. 3, ll. 23-29 and col. 4, ll. 11-12), and combining the metrics to determine a correlated performance metric (subtraction of server processing time from total delay results in the network delay time)(col. 4, ll. 15-20). This would have been an advantageous addition to the system disclosed by Bryant since it would have allowed more detailed information about the network to be gathered, and assisted in identifying the causes of delays experienced by users.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to collect performance metrics at both the client and the server, and combine the metrics to determine correlated performance metrics such as network delay time that cannot be determined by monitoring at a single site.

15. With regard to claim 2, Bryant further discloses that the performance monitoring function at the second site is initiated after the distributed application data are accessed at the second site (performance monitoring function is received appended to the distributed application data)(at least Col 9, Lines 5-18).

16. With regard to claim 3, Bryant further discloses the step of collecting the one or more performance metrics for the distributed application over the network (at least Col 9, Lines 19-28).

17. With regard to claim 4, Bryant further discloses applying a probabilistic sampling parameter to determine whether performance metrics are collected from each of a plurality of sites (at least Col 6, Lines 41-46).

18. With regard to claim 5, Bland further discloses collecting data about client sessions wherein data about request delays is collected for an entire session prior to sending it to the server (Col 3, Lines 19-23).

19. With regard to claim 6, Bryant further discloses that the probabilistic sampling parameter is applied on a per-request basis (individual request times are sampled) (at least Col 6, Lines 31-46).

20. With regard to claim 7, Bland discloses that the performance monitoring function at the second site determines a dwell latency (col. 4, ll. 21-32), a page stop event (col. 4, ll. 33-36). Bryant also discloses calculating the "response time of all gif's [sic] delivered" (col. 7, ll. 41-42), which appears to be a typographical error that should have read "all gif's delivered". Gif's are well known types of images, and a calculation of the response time of all gif's delivered would have at least resulted in the calculation of an image arrival time for the last image delivered.

21. With regard to claim 8, Bland further discloses determining whether to collect a performance metric as a based on a specific kind of performance metric that was determined (clients only collect data that is pertinent to a server in response to a request from that server) (Col 4, Line 64 to Col 5, Line 16).

22. With regard to claim 10, Bryant further discloses the distributed application data have a markup language format (web pages) (at least Col 8, Line 61 to Col 9, Line 13).

23. With regard to claim 12, Bryant further discloses that said one or more performance metrics is determined without any apparent effect on the access of the distributed application data at the second site (metrics are determined after page is retrieved) (at least Col 9, Line 15-28).

24. With regard to claim 21, Bryant discloses a method for determining and collecting at least one performance metric related to access of a Web page by a browser program on a client device, including at least one of a compound performance metric and a correlated performance for a network, comprising the steps of:

(a) enabling a user to request transfer of the Web page from a server device to the client device over a network (user clicks link to submit request)(at least Col 7, Line 61 to Col 8, Line 13);

(c) including machine instructions with the Web page that define, independent of any other instructions, a browser monitoring function, the Web page and machine

instructions being transferred to the client device as one data file (code is submitted as part of the page)(at least Col 8, Line 66 to Col 9, Line 15);

(d) when the Web page is loaded by the client device for rendering by the browser program, causing the client device to execute the machine instructions that define how to carry out the browser monitoring function, said browser monitoring function being implemented without requiring any affirmative action by a user of the client device (metrics are automatically determined after page is retrieved) (at least Col 9, Line 15-28);

(d) determining said at least one performance metric on the client device with the browser monitoring function without using the browser monitoring function to request any Web page from any site, at least one performance metric being determined in connection with timing of events occurring during transmission of the distributed application data to the client device (at least Col 9, Line 15-28).

Bryant further discloses how correlated performance metrics may be determined by combining the one or more performance metrics determined at the second site with a performance metric determined at the first site (col. 5, ll. 7-26), but fails to specifically disclose doing so.

Bland discloses a similar system for monitoring interactions between a first site and a second site (col. 2, ll. 1-16). Bland teaches determining a first performance metric at a first site (server collects performance metrics such as server processing time)(col. 3, ll. 17-22 & 48-52), determining a second performance metric at a second site (client collects metrics such as delays between requests and responses)(col. 3, ll. 23-29 and

col. 4, ll. 11-12), and combining the metrics to determine a correlated performance metric (subtraction of server processing time from total delay results in the network delay time)(col. 4, ll. 15-20). This would have been an advantageous addition to the system disclosed by Bryant since it would have allowed more detailed information about the network to be gathered, and assisted in identifying the causes of delays experienced by users.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to collect performance metrics at both the client and the server, and combine the metrics to determine correlated performance metrics such as network delay time that cannot be determined by monitoring at a single site.

25. With regard to claim 28, Bland further discloses that determining said at least one performance metric is done without the client device providing any indication to the user of the client device that said at least one performance metric is being determined (parameters may be collected by the client automatically for all data or in response to a request from a server) (Col 4, Lines 60-67). Bland also teaches that notifying and requesting permission before collecting data is optional (Col 5, Lines 11-14).

26. With regard to claim 31, Bryant further discloses that said at least one performance metric comprises a performance metric for each image included in the web page (response time of all gif's received)(at least Col 7, Lines 35-46 and Col 2, Lines 55-60).

27. With regard to claim 54, Bland further discloses collecting performance metrics for the server related to the transfer of Web pages (Col 3, Line 40 to Col 4, Line 59) and transmitting the metrics to a remote data center site for processing (central server that has management system) (Col 3, Lines 17-22).

28. With regard to claim 55, Bryant further discloses combining a performance metric determined by the browser monitoring function executed by the processing device with the server performance metric determined by the server computing function to determine the correlated performance metric (at least Col 4, Line 65 to Col 5, Line 21 and Col 8, Lines 20-25).

29. With regard to claim 56, Bryant further discloses a caching proxy (proxy server 30) (Par 119, Lines 6-11) disposed between the server computing device and the processing device (Fig 1, 30), but fails to disclose said caching proxy executing a caching proxy monitoring function that determined at least one performance metric related to a performance of the caching proxy.

Bland teaches a method of collecting performance metrics for a server related to Transfer of Web page requests to a client. Bland discloses that several types of metrics are collected at the server (Col 3, Line 41 to Col 4, Line 59). For example, the delay between a client request and a server response is measured to determine the load on the server (Col 3, Lines 47-51). This would have been an advantageous addition to the system disclosed by Bryant since the proxy server can have a significant effect on the

overall latency of client requests, and determining information about its performance is crucial to finding bottlenecks in the network.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to executing a monitoring function on the proxy server to determine at least one performance metric related to the performance of the caching proxy, since the proxy server has a significant effect on latency of client requests.

30. The remaining claims are rejected under the same rationale as the claims rejected above, since they recite substantially identical subject matter. Any differences between the claims do not result in patentably distinct claims and all of the limitations are taught by the above cited art. The table below lists the correlation between claims not individually rejected and the claims rejected above.

22, 23, 33, 34, 36, 43, 44, 63 and 68	3
24, 24 and 64	4
25 and 46	5
26 and 47	6
29, 38, 50 and 66	7
27, 48 and 65	8
62, 35 and 42	21
37 and 49	28
40, 52 and 67	31

Allowable Subject Matter

31. Claims 32, 41 and 53 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, first paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

Conclusion

32. Any inquiry concerning this communication or earlier communications from the examiner should be directed to AARON STRANGE whose telephone number is (571)272-3959. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ario Etienne can be reached on 571-272-4001. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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/Aaron Strange/
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